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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Petitioner*,

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES.

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CITATIONS.

Cases:

United States ex rel. Norwegian Nitrogen Products Company, Inc., v. United States Tariff Commission, 274 U. S. 106-112 2-3-4-5

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I.

That jurisdiction of this Court is herein duly invoked is admitted by the United States (Brief U. S. p. 2).

The question raised by the United States (Brief p. 2) as to which of the two Acts gives the Court jurisdiction is not necessary of determination in granting the writ sought so long as either Act so authorizes.

II.

The statement by the United States (Brief p. 3) is challenged. It reads:

> "In its petition and brief in the present case (pp. 4, 16, 17) the petitioner claims that the commission did not afford to *the petitioner reasonable opportunity to produce evidence and to be heard.* The record, however, shows clearly that, unless the company had a right to inspect data which had been submitted to the commission in confidence, *it was given all reasonable opportunity which could be given by the commission to contest the requested increase in duty.* The case, therefore, turns upon the question whether the company had a right to inspect such data." (Italics ours.)

It *assumes* in a single sentence, unsupported by citation of law or argument, the correctness of the Government's legal contention as to one of the several important issues in the case, to wit, that petitioner was given reasonable opportunity to produce evidence and to be heard. That the Government's legal contention upon this issue in this case is *erroneous* in all particulars has been decided by the Court of Appeals of the District of Columbia in *United States of America ex rel. Norwegian Nitrogen Products Company, Inc., Plaintiff in Error, v. United States Tariff Commission, et al.* (6 Fed. 2d. 491), which decision was expressly left undisturbed on appeal by this Court (274 U. S., 106).

The records shows that Petitioner's statutory rights were denied and due exception thereto granted. In *many* particulars in addition to the denial of the right to inspect data (R. 147, 148, 149) before the Commission. Said issues cannot be duly or appropriately presented or fairly decided on this petition, answer and reply. They, however, vitally concern very important rights of great commercial interests of the United States being presented and denied almost daily in the proceedings of the United States Tariff

Commission for want of clear and final adjudication thereof this Court.

III.

The United States, in its brief from the middle of page 3 to the middle of page 16, argues that the mere recital by this Court of some of the facts of the case, when previously before it and decided on an entirely different issue from that here presented, *Norwegian Nitrogen Products Co., Inc. v. United States Tariff Commission, et al.*, 274 U. S. 106, is a decision of the issues herein presented; whereas, this Court therein, after reciting certain facts, expressly stated of the decision of the court below, which held squarely against the contention of the Government there and here (6 Fed. 2d 491), that the court "reviewed the case at length *and announced its conclusion on the merits.*"

While quoting the foregoing, the Government significantly omits the further statement in this Court's decision making it very clear that this Court did not essay to decide this issue there and here presented, expressly stating with reference thereto "which *we* do not decide." (274 U. S., 111, 112.) Thereby it is shown that this Court expressly refused to decide the case on the merits, and intentionally and explicitly refused to disturb the "conclusion on the merits" reached therein by the Court of Appeals of the District of Columbia. (6 Fed. 2d. 491.)

Every argument herein offered by the Government on the merits of the case is squarely decided against it in said decision of the Court of Appeals of the District of Columbia, the sound logic and legal exposition of which decision the Government seeks to here avoid by claiming the same *dictum.*

IV.

The United States, in its brief (pp. 16, 17), concludes:

> "*The question is one of general importance,* but we believe it has been correctly decided in the Court of

> Customs and Patent Appeals. There is no existing conflict of decisions, but the *dictum* in the Court of Appeals of the District leaves the law uncertain in the courts of the District and a conflict is quite likely to arise in pending litigation. While we do not believe this is a case which falls within the rules of practice of this Court in granting writs of certiorari, *we are not disposed to oppose the granting of a writ* if in the exercise of its discretion the Court deems the case worthy of review. (Italics ours.)

Before decision below, the United States filed a certificate that the case was of that importance to warrant review by this Court (R. 199, 200). If that were true then, the fact that the Government prevailed below does not change the importance of the case. If it were of that importance then, it so remains and any opposition by the Government, even so feeble as here, may well be deemed a self-challenge to the candor of its previous representation to this Court.

The foregoing statement by the United States that the decision of the Court of Appeals of the District of Columbia (6 Fed. 2d. 491), is "*dictum,*" without any pretense of supporting legal authority or logical reason, is directly in conflict with the aforesaid statement of this Court, when considering the same on appeal (274 U. S., 106), that the lower court in rendering said decision "reviewed the case at length and *announced its conclusion on the merits.*" That holding by this Court, and that said decision is not *dictum,* is in exact accord with the long-settled doctrine of this Court in *Railroad Companies v. Schutte,* 103 U. S., 118, quoted in the petition herein at page 28, and the many like decisions therein cited, page 29. There is a direct conflict between this and the decision here sought to be reviewed, for which see Record 200-213.

V.

The United States, in its brief, p. 16, offers the following cogent reason why this petitioned writ *should be* granted. It states:

"There is now pending in the Supreme Court of the District of Columbia a case in which *one business organization is seeking to secure from the Tariff Commission information which rival business organizations gave to the Commission in confidence.* The Supreme Court of the District of Columbia may feel constrained to follow the dictum announced by the Court of Appeals of the District of Columbia." (Italics ours.)

Since counsel for petitioner herein is counsel for the petitioners in said proceeding, it would seem appropriate and incumbent to counteract any prejudice lodged by said statement by stating the facts: The "*one* business organization" which the Government charges therein with seeking to secure confidential information of "rival business organizations," as shown by the pleadings, includes of record more than 150 agricultural organizations and individuals, an important segment of practically all the great farm organizations of the United States; not for the purpose of reprehensively, as might be implied by said statement, prying into the affairs of rival business organizations, who happen to be importing competitors, but in the exercise of their statutory rights granted by Congress and deemed by them denied by the Commission, in a legal and laudable effort to maintain the competitive capacity of one of our greatest American agricultural industries, cheese production, which is vitally threatened by disastrous foreign competition. That proceeding is not a reprehensible quest of business secrets. There are none such unknown to these petitioners. It is an effort authorized by statute to maintain commercial existence by one of our great American agricultural industries, a substantial unit of our national body commerce.

It may with propriety be further stated to the Court that in said proceeding the Commission, *in pursuance of an intimation by this Court* (274 U. S., 106), is restrained by injunction from further proceeding in the matter until this

Court shall have finally decided the important issue *therein* and *herein* presented, to wit, what are the rights of interested parties appearing before the United States Tariff Commission under that provision of the flexible tariff which grants such parties the right in such proceedings to a "hearing," "reasonable notice thereof," "to be present, to produce evidence and to be heard" thereat? It may fairly be assumed that many important industries now haled before the Commission to defend existing, or appearing before it seeking different, tariff duties will likewise restrain the Tariff Commission from proceeding, as it constantly so persists, in a manner which, as to interested parties appearing absolutely reads out of the law and denies them their aforesaid statutory rights.

The appearance below of interested organizations, as well as the great array of petitioners in said District Supreme Court cases, bear witness to the great volume of American industry and labor that believes the rights Congress here gave are being denied and that final decision thereupon by this Court will insure grant of their rights.

The issue, therefore, is one of great public importance, final decision of which can be had solely by this Court. Such can most speedily be had by the granting of this writ and early decision of this case.

It may appropriately be said that this is one of several decisions of the Court of Customs and Patent Appeals upon the subject of the flexible tariff, its constitutionality and its due exercise, which, if reviewed and finally adjudicated by this Court, will at the same time and most speedily set at rest many questions as to the legality and proper procedure of the Tariff Commission and thereby greatly facilitate the highly important business of the Commission. These cases are, in the order of their docketing: No. 241, *Henry Blandheimer v. United States;* No. 261, *S. Leon & Company v. United States;* No. 262, *Fox River Butter Co. v. United States,* and No. 272, *Norwegian Nitrogen Products Co. v. United States* (the instant case).

The issues herein are not presented in any of the other cases. By granting this writ the Court will have the advantage of having before it all phases of these related controversies, and of disposing of them at the same time.

It is respectfully submitted that this is a case presenting questions of great and general importance, wherein there is a direct conflict of decision thereupon between the two co-ordinate courts next in authority of decision to this Court, and, therefore, as suggested by the Government in that situation (brief, pp. 17, 18) and urged by petitioner, worthy of review by this Court.

The conduct of business of an important branch of the Government is being delayed and may be seriously arrested until final decision by this Court of the issues herein presented.

Very respectfully submitted,

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September, 1932.